United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

TO BE ARGUED BY:
Eugene Murphy

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75-2014

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, ex rel JOHN McLEAN :

Petitioner :

-against- :

JEROME PATTERSON, Superintendant, Eastern Correctional Facility :

Respondent-Appellee :

- -x

DOCKET NO. 75-2014

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF AND APPENDIX FOR RELATOR-APPELLANT

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UNITED STATES OF AMERICA, ex rel. JOHN McLEAN :

Relator-Appellant :

-against- : DOCKET NO. 75-2014

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Respondent-Appellee :

- -x

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR RELATOR-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order dismissing the petition for a writ of habeas corpus entered on December 20, 1974 by the Honorable Mark A. Constantino, United States District Judge, Eastern District of New York. The order and opinion are unreported and are reporduced at pages A-1 through A-10 of the Appendix.

In the District Court the relator-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the relator-appellant in this Court.

STATEMENT OF ISSUES PRESENTED

1. Whether the items found upon a search of appellant should have been suppressed because the arrest immediately prior thereto was improper since it was based on unverified information supplied by an informer of no established reliability?

2. Whether a confession obtained shortly after said arrest should have been suppressed as tainted by the illegality of that arrest?

3. Whether the reading into evidence of appellant's prior record of conviction of an identical crime was so prejudicial as to violate his right to a fair trial?

STATEMENT OF THE CASE

This is an appeal from an order of the District Court, Eastern District (Constantino, J). rendered December 20, 1974 denying appellant's petition for a writ of habeas corpus. Appellant had been convicted on April 5, 1973 in the County Court of Nassau County of robbery in the second degree and was sentenced on May 11, 1973 to an indeterminate term of imprisonment with a maximum of ten years and a minimum of three and one third years. The Appellate Division, Second Department aff'd the conviction on January 17, 1974, 44 A.D.2d 572, 353 N.Y.S.2d 226 at the New York Court of Appeals (Breitel, C.J.) denied leave to appeal on April 19, 1974.

The facts of the case, as brought out in an omnibus hearing and a trial producing very similar testimony were found by the trial judge in his findings of fact after the hearing. Since appellant does not and cannot disagree with the findings 28 U.S.C. 2254 (d), he will limit his statement of the facts to reproduction of the opinion.

STATEMENT OF FACTS

FINDINGS OF FACT AFTER OMNIBUS HEARING

On the evening of November 11, 1972 at approximately 6:00 p.m., Constance Abrams, the complainant, was walking along Gilcrest Road in the vicinity of Schenck Avenue, Great Neck, N.Y. Mrs. Abrams heard footsteps, turned around and was attacked. Her assailant struck her several times and knocked her to the ground. She threw her pocketbook at him but he hit her again and again, whereupon she got up and started to run and scream. Her attacker then grabbed her by the hair, pulled her into an alley adjacent to an apartment house and said "Now I've got to kill you". At that point a woman opened a window and shouted "What are you doing to her?", whereupon the assailant fled. This entire incident lasted approximately five minutes.

Patrolman Arthur Swoboda who was on motor patrol responded to the scene. He obtained an oral statement of the sequence of events from Mrs. Abrams and a brief physical description of her attacker. The assailant was described as a male Negro, about 6' 1" or 6' 2" tall, short hair, clean shaven and light complexioned. Visibility was limited because of the lateness of the hour, but Mrs. Abrams felt that she could identify her assailant.

Patrolman Swoboda spoke to Mrs. Abrams a second time at about 7:00 p.m. that same day at the North Shore Hospital where she had been taken in order to determine the nature and extent of her injuries. Mrs. Abrams then repeated the same information she had provided earlier.

On November 12, 1973 Mrs. Abrams met with Detective Arthur Meininger and Detective Reuben Gomez of the 6th Precinct. She recited in detail her activities leading up to the attack and all that followed. She also informed the detectives of the contents of her handbag, namely: wallet, checks, charge account cards and cosmetics. Mrs. Abrams described her assailant as a large Negro man, clean shaven, long sideburns, close-cropped hair, approximately 6' 2" tall, wearing a 3/4 length jacket.

On November 13, 1973 at her apartment, Detective Meininger asked Mrs. Abrams if she could identify her assailant and she responded in the affirmative. She then accompanied him to the 6th Precinct. She was shown between twenty and thirty photographs from which she selected one (Defendant's "A" in evidence) as being a person who resembled but wasn't her assailant. Detective Meininger also drove her around the general area of the incident in order to see if she could spot her assailant, to no avail.

In court Mrs. Abrams positively identified the defendant as her assailant. The first time she actually saw the defendant after the attack upon her was at the defendant's felony examination when she also positively identified him. It emerged during the hearing that the defendant had been only inches away from her during the attack and that he had struck her several times, perhaps as many as ten times.

On November 16, 1972 Detective Daniel Sonensen was on the 9:00 a.m. to 5:00 p.m. tour at the 6th Precinct of the Nassau County Police Department with Detective Gomez. Detective Sonensen was informed that there had been a robbery of Constance Abrams which occurred at Schenck Avenue and Gilcrest Road, Great Neck, N.Y. at approximately 6:00 p.m. on November 11, 1972. Detective Sonensen was aware that: (a) the perpetrator had been described as about 6' tall, medium length hair, well dressed, clean shaven, neat; (b) the complainant had been dragged into an alley and beaten; and (c) the proceeds of the robbery included cash, credit cards and checks.

On November 16, 1972 Detective Gomez interviewed one, Jimmy Woods relative to this robbery. The interview started before lunch and was completed in the early afternoon. The substance of that interview appears in the signed statement of James Woods. (Defendant's "B" in evidence) During the early afternoon, Detective Gomez advised Detective Meininger, Detective Sonensen and Detective Robert Steinmann of this information. Detective Gomez communicated to Detective Sonensen the following information which he had obtained from James Woods, namely that the defendant had come into James Woods' room with some checks and credit cards with the name Abrams on them, and asked Woods if he could do anything with them. Mr. Woods took some checks from the defendant.

Detective Gomez communicated to Detective Sonensen a description of the defendant provided by James Woods, who said that the defendant was a medium skinned Negro, neatly dressed, wearing green patent leather shoes with wedge heels, leather jacket and wide collar shirt, and that he (the defendant) could be found in a laundromat opposite the Great Neck Long Island Railroad Station.

Detective Sonensen spoke to James Woods himself and was given the same description, and was further advised by James Woods that he did not know if the defendant was armed; that he might carry a knife; but that McLean would not go easily; that he was tough.

On November 16, 1972 at approximately 12:30 p.m., Detective Sonensen accompanied by Detective Steinmann and Detective Russell Burton proceeded to the laundromat in order to try to apprehend the suspect. When they arrived, no one fitting that description was there. They staked out the location and one-half hour later, at approximately 1:00 p.m., someone perfectly matching the description provided by James Woods came along, with one hand in his pocket and the other holding a brown paper bag. As the suspect approached the laundromat, Detective Sonensen called out "John McLean" which the defendant acknowledged. Detective Sonensen then advised the defendant that they were investigating a robbery and asked him to accompany them to the 6th Precinct Station House.

Detective Sonensen advised the defendant of his "Miranda" warnings and asked if McLean understood these "Rights". The defendant nodded affirmatively and said "Yes", he understood, "but you have the wrong guy".

The defendant and the officers crossed the street to the squad car. Before entering the car, Detective Sonensen asked the defendant to stand aside and gave him a pat-down search. Detective Sonensen stepped behind the defendant and worked down from the shoulders. When Detective Sonensen frisked the defendant's right-hand coat pocket he felt a bulge, reached inside and came out with assorted papers and a checkbook bearing the surname, Abrams. The detective had believed the bulge to be a knife.

The three detectives and the defendant then entered the police vehicle and drove to the 6th Precinct Station House. There was no conversation enroute. They arrived at the Station House at approximately 1:15 p.m. The defendant was logged in at the desk and then taken to a squad room in the basement where the defendant was placed in the first interrogation room.

Detective Sonensen informed the defendant of the details of the alleged robbery and then with Detective Harvey Goldberg present he advised the defendant of his "Rights", reading from a printed card.

The defendant nodded affirmatively and said "Yes, I understand". The defendant looked at the card which had been handed to him and in substance said that he understood what had been read to him; that he didn't want an attorney; that he had no knowledge of this matter; that they had the wrong guy.

Detective Sonensen then rose from his seat at his desk and told the defendant that this was a serious crime - that the victim could identify the perpetrator - that the defendant would be placed in a line-up for the purpose of a possible identification and that he was going to call the complainant then and there. The defendant responded to this by requesting the detective, in substance, to wait a minute. The defendant asked the detective if he could help him - that he had just gotten out of jail and he didn't do any forgery - that he cannot read or write. Detective Sonensen told the defendant that he didn't know if he could do anything for him but that the defendant should tell the truth.

Detective Sonensen again reviewed with the defendant his constitutional rights. The defendant indicated he understood what the detective said and that he didn't want an attorney.

Detective Sonensen then asked the defendant to tell him what had happened. The defendant replied that he saw a white woman walking; that he grabbed her pocketbook and knocked her down; that she tried to get up and he knocked her down again; that he kept punching her; that she tried to get into an alley; that she kept screaming and he continued to punch her; that somebody yelled, and he ran.

After that, Detective Sonensen, in the presence of Detective Goldberg and the defendant, proceeded to take a typewritten statement from the defendant. Detective Sonensen typed the heading and the first two paragraphs and removed the paper from the machine. The detective then read these two paragraphs which contained the "Miranda" warnings and "waiver" to the defendant. Detective Sonensen then asked the defendant to mark an "X" after the second paragraph to signify his understanding, whereupon the defendant indicated that he could sign his name and did so.

Detective Sonensen then put the original and the copies back into the typewriter and typed the body of the defendant's statement. Detective Sonensen proceeded to ask the defendant to repeat his story sentence by sentence. Detective Sonensen typed each statement and read it back to the defendant sentence by sentence. The defendant then signed his name at the bottom, and Detectives Sonensen and Goldberg signed their names as witnesses. The statement (People's Exhibit #2 in evidence) was completed and signed at approximately 2:00 p.m., November 16, 1972.

Detective Sonensen made no threats or promises to the defendant. The defendant did not ask for medical attention. The defendant appeared normal and had not been drinking. When the defendant asked for food and drink, he was given and he ate the chicken and coke which were in the paper bag that had been taken from him at the time of his arrest.

After the taking of the defendant's statement, he was booked, fingerprinted and processed. During the processing, the defendant was asked if he possessed any other items which had been taken in the robbery. The defendant replied that he had a wallet which contained a driver's license and other items in his room.

A consent search form (People's Exhibit #3 in evidence) was read and explained to the defendant. Typed on that form was the phrase "defendant doesn't read or write". The defendant signed the consent form authorizing a search of his room and a seizure of the proceeds of the robbery.

The defendant then accompanied Detectives Sonensen and Goldberg by police vehicle to the defendant's room. They arrived there at approximately 3:00 p.m. and entered the premises via a basement hallway. The defendant unlocked the padlock on the door and they entered his room. The defendant had advised the Detectives that the wallet was in the closet under some clothes on the shelf, as a result of which Detective Sonensen went to the closet, placed his hand under the clothes on the shelf and removed the wallet. (People's Exhibit #4 in evidence, including contents) The two detectives and the defendant were in the defendant's room for approximately five minutes, and the defendant's brother and James Woods came into the room while they were there. The detectives then returned to the 6th Precinct with the defendant.

The Court finds that there was no unlawful pre-trial show-up. The Court further finds that the defendant's photograph was not selected by the complainant nor was there an impermissibily suggestive photographic identification. In conclusion, testimony of an in-court identification is admissible upon the trial of this indictment. (United States v. Wade, 388 U.S. 218)

The Court finds that the defendant was properly advised of his "constitutional rights". Adequate steps were taken to insure his understanding in view of his self-claimed inability to read and write. The defendant was capable of waiving and did knowingly, intelligently and understandingly waive his "constitutional rights". (People v. Huntley, 15 NY 2d 72) No force, threats, pressure or improper persuasion were employed in order to induce the defendant's statement. The Court therefore concludes that the defendant's alleged signed statement and the testimony of the events incident thereto are admissible upon the trial of this indictment.

Detective Sonensen had probable cause to arrest the defendant. The statement made by the informant, James Woods, was against his penal interest and was substantially consistent with the information received from the complainant. James Woods accurately described the defendant, his attire and his probable location. The sum total of the information known by Detective Sonensen created probable cause to believe that the defendant had committed the robbery of Constance Abrams. In addition, Detective Sonensen was justified in searching the defendant upon his arrest. The defendant was believed to have committed a violent crime. The informant had stated that the defendant might be armed with a knife and that he would not be taken easily. The search and seizure of the checkbook which Detective Sonensen feared might be a knife upon the initial pat-down was proper as incident to a lawful arrest. That checkbook is admissible upon the trial.

The items seized from the defendant's room were obtained pursuant to a consentual search. After having been advised of the contents of the consent form (People's #3 in evidence), the defendant signed the form authorizing the search. The items seized pursuant to this consentual search are likewise admissible upon the trial.

In view of the foregoing, the defendant's motion is in all respects denied.

PROCEEDINGS IN DISTRICT COURT

On July 12, 1972 appellant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York seeking a reversal of his conviction. On December 20, 1974 Judge Constantino entered an order dismissing the petition. In the accompanying memorandum the Court stated that the alleged absence of probable cause for an arrest had not been proved; that the information supplied by an informer had been sufficiently corroborated to permit admission of the property found upon an incident search and of a subsequently obtained confession and that the reading to the jury of appellant's prior record of conviction had not deprived appellant of a fair trial. This decision is unreported.

ARGUMENT

POINT ONE

THE EVIDENCE FOUND UPON THE SEARCH INCIDENT TO ARREST SHOULD HAVE BEEN SUPPRESSED DUE TO THE ILLEGAL ARREST

Upon the receipt of information from an informant, the police arrested and searched appellant. A checkbook and credit cards belonging to the complainant were found. Since no probable cause to arrest had been supplied by the unsubstantiated information given by an informer of untested reliability, this evidence should have been suppressed.

A picture of one James Woods had been selected by the complainant and said to look like her assailant. Upon interrogation Woods stated that the appellant had given him property of complainant. He described appellant in detail and told the police that appellant could be found at a laundromat in Great Neck whither the police travelled. They located, arrested and searched appellant finding the property of complainant on his person.

As the District Court properly pointed out it is "crucial to this case to determine if the arrest of McLean was unlawful" since, if so, the search was unauthorized and the evidence found together with the subsequent confession (see Point Two) were inadmissible (A-5).

Central to determination of the "lawfulness" of the arrest is evaluation of the information given by the informer. Without the information no probable cause existed. With it probable cause does exist if the informer is one of proven reliability

or his information is verified and corroborated by independent investigation. United States v. Manning, 448 F.2d 992 (2nd Cir., 1971); United States v. Soyka, 394 F.2d 443 (2nd Cir., 1968).

Here there is no evidence that Woods had given information to the police in the past and had thus proven his reliability. His information could be accepted as a basis for finding probable cause only if it had been objectively checked or verified. "Where an informant supplies the basis for probable cause, the probative value of his report must be independently determined..." United States v. Lee, 428 F.2d 917, 922 (6th Cir., 1970).

In Whitely v. Warden, 401 U.S. 560, 567, the Supreme Court added

> This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone... But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony...

The District Court, recognizing this principle, found that Woods' statement had been corroborated in three ways

> [1] it appears that Woods' description of McLean was almost identical to the description which Mrs. Abrams gave of her assailant. Before arresting relator the police had ample opportunity to observe that he fit this description
>
> [2] Moreover, Woods's description of the items which he claimed were shown him by McLean perfectly matched the description of the items that Mrs. Abrams claimed were stolen from her

[3] Finally, the relator himself corroborated Wood's information by responding to Detective Sonesen's call of the name "McLean", a name supplied to the police by Woods (A-6, A-7).

Appellant contends that the second and third items prove nothing more than that Woods knew appellant and had seen the proceeds of the robbery. They demonstrate no connection of appellant with the crime.

In United States v. Soyka, supra, this Court reiterated the principle that sheer "wealth of detail" including a specific physical description and the address of the defendant was insufficient to corroborate the informer.

In Gatlin v. United States, 326 F.2d 666 (D.C. Cir., 1963) a suspect in a restaurant robbery was arrested about two hours after the crime. A toy gun and a large amount of change were found on his person. At the stationhouse he confessed and implicated Miller who was arrested without a warrant on that information alone.

> Miller's arrest was...without probable cause, being based solely on information obtained from an accomplice whose reliability is neither alleged nor established. at 671.

That conclusion was reached in spite of the adverse impact of the statement on the declarant's penal interest and its consistency with the facts of the robbery.

Thus the corroboration of the information must be found in the first element - that of the supposedly matching descriptions.

In comparing the descriptions obtained by the police from the complainant and those from Woods, it must be understood that there were discussed, three descriptions from the complainant and five from Woods, all involving a black male.

Mrs. Abrams testified that she had described her attacker as 6'2", cleanshaven, with very long sideburns and wearing a three-quarter length jacket (A15-A18). Patrolman Swoboda remembered her description of a man 6', 6'1" or 6'2", light-skinned and cleanshaven (A27-A28). Sonesen then testified that he had heard that the description was 6', neat, well-built and cleanshaven (A11-A12).

Clearly, if the finding of probable cause were sought to be founded on the knowledge of Sonesen alone no corroboration would exist since his description was a general one without any significant points for comparison with that given by Woods.

Soneson had been directed to make the arrest by Brendale. Thus probable cause could be found only under the theory of United States v. Canieso, 470 F.2d 1224 (2nd Dept., 1972) that

> "in a large metropolitan police establishment the collective knowledge of the organization as a whole can be imputed to an individual officer when he is requested or authorized by superiors or associates to make an arrest. at 1230, n. 7; United States ex rel Scott v. LaVallee, 379 F.Supp 111, 115 (S.D.N.Y., 1974)

Thus the issue is what description any of the police officers had of the perpetrator prior to Woods statement The testimony with regard to the most specific description is that of the complainant. Swoboda testified that the description she had given to him was of a man 6' to 6'2"

and light skinned (A27-A28). This description also was too general to provide a basis for comparison and was conceded by the complainant to have been inaccurate (77).

Thus the case turns on the description supposedly given by Mrs. Abrams to Meininger and Gomez the day after the crime (A15-A18). However, Detective Gomez testified that he never saw complainant after the day of the incident (481). Detective Meininger stated that he had taken a tentative description from Mrs. Abrams but could not remember the details (A24; A25).

If the description was given as testified by complainant, it added that the attacker had been 6'2" tall, cleanshaven with very long sideburns and wearing a three-quarter length jacket (A15-A18). According to the testimony Woods described an individual 6' tall with thick sideburns and a three-quarter length jacket (A19). However, as it turned out appellant was 5'8" and weighed 172 pounds (A29).

Clearly these discrepancies with respect to height, between 6' and 6'2" and between 6'2" and 5'8" render the descriptions materially distinct. Appellant's long or thick sideburns and his wearing of a not uncommon garment cannot sufficiently corroborate the information of Woods in light of the confusion as to height.

The untested information of an informer of unproven reliability cannot support a warrantless arrest. Aguilar v. Texas, 378 U.S. 108, Spinelli v. United States, 393 U.S. 410; Williams v. Adams, 441 F.2d 394 (2nd Cir., 1971). In the

absence of probable cause appellant's arrest was unproven and the items obtained upon the search should have been suppressed.

POINT TWO

APPELLANT'S CONFESSION SHOULD HAVE BEEN SUPPRESSED AS TAINTED BY THE PRIMARY ILLEGALITY

Appellant was arrested without probable cause. Within an hour he confessed. His statement was inadmissible as tainted by the impropriety of the arrest.

Having been arrested and searched without probable cause (Point One), appellant was transported to the stationhouse where he arrived at 1:15 P.M. He was interrogated by two police officers who placed the property, taken from him and identified as belonging to the complainant, on the desk in the interrogation room. By 2:00 PM. defendant had confessed his guilt of the robbery and signed a written statement to that effect.

In an effort to deter illegal arrests the courts exclude not only immediately obtained evidence but also that found as a result thereof.

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it should not be used at all. Fahy v. Connecticut, 375 U.S. 85, 91: Silverthorne v. United States, 251 U.S. 385.

Thus in Fahy the possible use of property illegally seized to induce a confession required remand for a fact finding on that issue.

The "fruit of the poisonous tree" doctrine in its application to confessions is most extensively developed in Wong Sun v. United States, 371 U.S. 471. Therein a confession obtained a

few minutes after an unlawful arrest was found to be inadmissible

> ...verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion. at 485.

See also Gatlin v. United States, 326 F.2d 666, 672 (D.C. Cir., 1963); United States v. Marrese, 336 F.2d 501, 504 (3rd Cir., 1964).

> It has been stated that "[i]n Wong Sun, the illegal arrest alone made the post-arrest admissions while still in custody poisoned fruit." Gatlin [cite]. This view is buttressed by the Supreme Court's approving citation, 371 U.S. at 486...of Bynum v. United States...262 F.2d 465, which held that the fact that an illegal arrest enabled the police...to take... fingerprints while the suspect was illegally detained is in itself and without more sufficient ground for excluding them [the fingerprints] from evidence. Collins v. Beto, 348 F.2d 823, 827 (5th Cir., 1965).

Moreover, the evidence improperly seized upon appellant's arrest was placed in his view during the interrogation. Such use of tainted evidence also voids resultant admissions. Fahy v. Connecticut, 375 U.S. 85, 91.

> [I]f the police use illegally seized evidence to induce or trigger a confession, the confession is not admissible against one who has standing to complain of the illegal search. McCloud v. Bounds, 474 F.2d 968, 970 (4th Cir., 1973).

Here appellant was unlawfully arrested, searched and detained. While in custody a confession was drawn up and signed within an hour. That confession should have been suppressed.

POINT THREE

APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY ADMISSION OF HIGHLY PREJUDICIAL EVIDENCE OF A PRIOR CONVICTION

Appellant was tried for robbery, larceny and assault. During the course of the trial the prosecutor over objection of appellant was permitted to read to the jury from a police form the following paragraph:

> Prior arrest admitted by defendant for robbery and assault, 1968, spent four years in Green Haven, Stormville, New York. (A-30, A-31).

Appellant did not testify at trial and under New York law the admission of this evidence was error. People v. Molineux, 168 N.Y. 264. The Appellate Division in its opinion recognized it as such but stated

> the trial judge later clearly charged the jury to disregard the form and its contents. Moreover, the proof of defendant's guilt was so overwhelming that there was no reasonable possibility of a verdict other than the one rendered. Under these circumstances, we deem the error harmless.

As Judge Constantino pointed out, "that error was committed...is certain." (A-8, A-9).

Thus the issue before this Court is simply whether the error comitted was so grievous as to warrant relief in a habeas corpus proceeding. Of course, since the alleged error is evidentiary and did not violate a specific guarantee of the Constitution, habeas corpus is appropriate only if the error was "of such a nature that petitioner was deprived of a fundamentally fair trial." United States ex rel Conomos v. LaVallee, 363 F. Supp 994 (S.D.N.Y., 1973); United States ex rel Castillo v. Fay, 350 F2d 400, 401 (2nd Cir., 1965). Other courts have held

that the error "must be material in the sense of a crucial, critical highly significant factor." Lawrence v. Wainwright, 445 F2d 281, 282 (5th Cir., 1971); Luna v. Beto, 395 F2d 35, 41 (5th Cir., 1968) c.d.394 U.S. 966.

Appellant contends that the error in this case reached that level. Tried for robbery and assault, he was revealed to the jury as a man who had been previously convicted of an identical crime. Moreover the jury was informed that appellant had served four years in an upstate prison for that crime. The jury could certainly infer that relator was a professional criminal specializing in robberies and an ex-convict whose last crime had warranted a heavy sentence.

After making the patent conclusion that a defendant shown to have previously committed a crime similar to that for which he is being tried is more likely to be convicted, the court in Lane v. Warden, 320 F2d 179, 186-187 (4th Cir. 1963) stated:

> In the case at bar the probability of prejudice to the defendant Lane was overwhelming, yet the offending disclosure could easily have been avoided. In such a case it is the duty of the federal courts to safeguard against the states's violation of the individual's constitutional right to a fair and impartial trial. The right to a fair trial is one of those rights which have been found to be implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319.
>
> ...
>
> We reach the conclusion that under the facts of this case the reading to the jury, at the commencement of Lane's trial, of that portion of the indictments relating to his prior convictions destroyed the impartiality of the jury and denied him due process of law.

Although the Supreme Court in Spencer v. Texas, 385 U.S. 554 upheld the use of prior convictions in one-stage guilt-

punishment trial, Lane, which had rejected such a procedure, remains important for our case in which no dispute as to the presence of error exists. Clearly the introduction of other convictions can be error of such magnitude that the Federal courts must intervene when a habeas corpus proceeding is brought.

> The issue, in each instance, requires a determination whether the probative value of the evidence, for the purpose for which it was admitted, outweighs the prejudice to the accused in the admission of the evidence. ...When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then the use of such evidence by a state may rise to the posture of the denial of fundamental fairness and due process of law. United States ex rel Durso v. Pate, 426 F2d 1083, 1086 (7th Cir., 1970)

Here there is absolutely no legitimate probative value in admission of the conviction. Its prejudice is clear. Under New York law it should have been excluded because of that prejudice.

If a conviction for a different crime was involved or if the seriousness of the prior conviction had not been revealed by disclosure of the lengthy sentence, the error might be harmless. But the identity and nature of the offenses could not but render the jury unfit to determine appellant's guilt or innocence.

CONCLUSION

FOR THE ABOVE REASONS THE ORDER OF THE DISTRICT DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE REVERSED

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel. JOHN McLEAN,

Petitioner,

v.

JEROME PATTERSON, Superintendent, Eastern Correctional Facility,

Respondent.

74-C-1018

MEMORANDUM and ORDER

DEC 20 1974

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Appearances:

James J. McDonough, Esq., Legal Aid Society of Nassau County, 400 County Seat Drive, Mineola, New York 11501, Matthew Muraskin and Eugene Murphy, Esqs., of counsel, for petitioner

Louis J. Lefkowitz, Attorney General of the State of New York, Two World Trade Center, New York City 10047, Margery Evans Reifler, Deputy Assistant Attorney General, of counsel, for respondent

COSTANTINO, D.J.

On July 12, 1974 John McLean submitted to this court a petition for a writ of habeas corpus asserting that the state conviction for which is is presently incarcerated was unlawful and unconstitutional. Mr. McLean was convicted on April 5, 1973 in County Court, Nassau County of robbery

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in the second degree after a jury trial, and was sentenced to prison on May 11, 1973 for a minimum of three and one-half to a maximum of ten years. The Appellate Division, Second Department affirmed the conviction on January 17, 1974, 44 App. Div. 2d 572, 353 N.Y.S.2d 226 and the New York State Court of Appeals denied leave to appeal on April 19, 1974.

The specific grounds for seeking the writ are:

(1) The arrest of the relator was improper since it was based on unverified information supplied by an informer of no established reliability, thereby rendering objects seized in a search incidental to that arrest and the confessions procured immediately thereafter unlawfully obtained in violation of the relator's Fourth Amendment rights.

(2) A prior record of arrest of the relator was read to the jury by the prosecutor thereby denying the relator a fair trial in violation of his right to due process.

With regard to relator's first contention, the relevant facts are as follows:

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On the evening of November 11, 1972, in the vicinity of Gilcrest Road and Schenck Avenue in Great Neck, New York, Constance Abrams was assaulted and robbed of her pocketbook and its contents by a person whom she described to the police on three separate occasions as a large Negro man who was clean shaven, approximately six feet, one inch in height, with long sideburns, close cropped hair, light complexion and who was wearing a three-quarter length jacket. On the morning of November 13, 1972, two days after the robbery, Mrs. Abrams accompanied Detective Meininger of the Nassau County Police Department to the 6th Precinct where she was shown between twenty and thirty photographs. She selected one of these as being a person who resembled but was not her assailant. Police records revealed that the photograph selected by Mrs. Abrams was that of James Woods.

Later that morning, James Woods was questioned by Detective Gomez at the 6th Precinct. Woods informed Detective Gomez that a man named John McLean, the relator here, lived in an upstairs apartment in his (Woods's) building; that several days earlier McLean had come into his room with some checks and credit cards bearing the surname Abrams and

that McLean asked him if he could "do anything with them." Woods reported that he took the checks from McLean but subsequently returned them. Woods described McLean as a medium skinned Negro about six feet tall, neatly dressed, wearing a leather jacket and green patent leather shoes. He said that McLean could be found in a laundromat opposite the Great Neck station of the Long Island Railroad. Detective Gomez then relayed this information to Detectives Sonesen, Meininger and Steinmann. Detective Sonesen spoke to Woods himself and was given the same description of McLean.

Acting on this information, Detectives Steinmann, Sonesen and Burton proceeded to the laundromat identified by Woods to apprehend the suspect. They staked out the location and one half hour later, at approximately 1:00 p.m., someone whom Detective Sonesen recognized as perfectly matching the description provided by Woods, approached the laundromat. Detective Sonesen called out "John McLean" and the suspect turned toward him and acknowledged his name. At this point McLean was arrested. He was escorted to a waiting police vehicle but before entering it he was asked

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by Sonesen to stand against the car, whereupon Sonesen gave him a pat-down search. During this search Detective Sonesen felt a bulge in McLean's right hand coat pocket. He reached inside and withdrew assorted papers and a checkbook bearing the surname "Abrams."

The suppression of the checkbook and a confession given by McLean immediately after his arrest and after proper Miranda warnings were given are the subjects of this petition. It is a fundamental principle of law that objects seized or confessions procured immediately following an arrest must be suppressed as illegally obtained evidence if the arrest was itself unlawful. Wong Sun v. United States, 371 U.S. 471 (1963). It is therefore crucial to this case to determine if the arrest of McLean was unlawful. At the outset it must be noted that an arrest without a warrant can be made only if there is probable cause to believe that the person arrested has committed a crime. Brinegar v. United States, 338 U.S. 160 (1949). Probable cause, if it exists at all, must exist at the time of the arrest and its existence is determined by considering the collective information known by the police at that time. Smith v. United States, 358 F.2d 833 (D.C. Cir. 1966); Beck v. Ohio,

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379 U.S. 89 (1964). The critical question, then, is whether applying these standards to the circumstances of this case, a finding is warranted that probable cause existed to arrest the relator. It is clear that no such finding can be made unless substantial weight is placed on the information supplied by James Woods, an informer who had not previously established his reliability to the police. "The law has wisely circumscribed the use of informers' reports as the basis for making an arrest." Jones v. United States, 266 F.2d 924, 928 (D.C. Cir. 1959). It has required a showing of reliability of the informer and some corroboration of the informer's information by facts within the knowledge of the police at the time of the arrest. See Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

As to the question of corroboration of Woods's information, it appears that Woods's description of McLean was almost identical to the description which Mrs. Abrams gave of her assailant. Before arresting relator the police had ample opportunity to observe that he fit this description. Moreover, Woods's description of the items which he claimed were shown him by McLean perfectly matched

the description of the items that Mrs. Abrams claimed were stolen from her.[5] Finally, the relator himself corroborated Woods's information by responding to Detective Sonesen's call of the name "McLean", a name supplied to the police by Woods.

From these facts the court finds that the information supplied by Woods was substantially corroborated by information already within the knowledge of the police at the time Woods was questioned and at the time relator was arrested. Accordingly, the contention that Woods lacked reliability is without substance. United States v. Samuel Sultan, 463 F.2d 1066 (2d Cir. 1972); United States v. Viggiano, 433 F.2d 716 (2d Cir. 1970), cert. denied, 401 U.S. 938 (1971). Although Woods had not established his reliability by providing police with reliable information on prior occasions, his corroboration of external circumstances occuring in the course of the case at hand was sufficient to justify the police in relying on Woods's information. Costello v. United States, 324 F.2d 260 (9th Cir. 1963). See also Draper v. United States, 358 U.S. 307 (1959); United States v. Harris, 403 U.S. 573 (1971). The court therefore finds that Detective Sonesen had

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probable cause to believe that relator had committed the crimes of assault and robbery. The arrest was lawful and the search of McLean, the seizure of the checkbook from his person, and the procuring of a confession immediately following the arrest were likewise valid.

With regard to relator's second claim it appears that during the course of the cross-examination of Detective Sonesen at the trial the relator introduced form 85-A (defendant's F) into evidence in order to impeach the credibility of the witness. Form 85-A is the record of arrest of the relator. On redirect, the prosecutor offered to read the entire record which included a statement that the relator had served four years in prison for an assault and robbery conviction in 1968. The statement was read over the objection of relator's trial counsel; however, at a later point in the trial, the judge, realizing his error, struck the statement from the record and charged the jury to disregard the improperly admitted form and its contents.

That error was committed when the relator's arrest record was allowed to be read to the jury is certain. People v. Condon, 26 N.Y.2d 139, 257 N.E.2d 615, 309 N.Y.S.2d

152 (1970). However, this court is not empowered to redress all wrongs committed in the course of state proceedings. Rather, this court, pursuant to its power to grant writs of habeas corpus to state prisoners, 28 U.S.C. § 2254, may redress only such errors as deprive relator of a constitutionally protected right. United States ex rel. Costello v. Fay, 350 F.2d 400 (2d Cir. 1965); United States ex rel. Conomas v. LaVallee, 363 F. Supp. 994 (S.D.N.Y. 1973).

It is relator's contention that the reading of his arrest record to the jury was so prejudicial as to deprive him of his Fifth and Fourteenth Amendment rights to due process. The court finds that the relator was not so deprived. Review of the trial record reveals that the evidence against the relator was so overwhelming that it is virtually certain that the jury would have reached the same result without having heard the prior arrest record of the relator. The court cannot close its eyes "to the reality of overwhelming evidence of guilt fairly established in the state court." Milton v. Wainwright, 407 U.S. 371, 377 (1972). Moreover, the trial judge, aware of his error, charged the jury to disregard the prior convictions of the

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relator. Under these circumstances, this court deems the error committed harmless and not in violation of relator's right to due process.

Since relator has not established that he has been deprived of a constitutionally protected right, his petition must be denied.

U. S. D. J.

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the defendant, John McLean?

A Yes, I do.

Q Is he in the courtroom?

A Yes, he is seated at the defense counsel table, he is the Negro to the right of counsel.

MR. PECK: May the record so reflect?

THE COURT: Yes.

Q And did you have occasion to see the defendant McLean on November 16, 1972?

A Yes, I did.

Q Now, Detective, prior to seeing the defendant on November 16, 1972, were you aware that an alleged robbery occurred on November 11, 1972, in the vicinity of Cilcrest Road and Schenck Avenue in Great Neck?

A Yes, I was aware of it.

Q And when did you first become aware of that alleged robbery?

A I would say possibly twenty-four hours after the incident, upon arriving to work at the Sixth Squad.

Q And what did you learn about that robbery, Detective?

A I was aware of the location and the complainant's name.

Q What was the complainant's name?

A Constance Abrams. I was aware a male Negro had perpetrated the crime who was approximately six foot tall, medium hair length and that he was well dressed, clean shaven, neat and this crime had taken place approximately in the vicinity

of six o'clock in the evening.

THE COURT: Of what date?

THE WITNESS: November 11, 1972.

Q Were you aware of any of the details of the crime?

A That the perpetrator had struck down the victim with his fists after taking - -

MR. BRANDT: Your Honor, may I object to this line of questioning, it is all heresay.

THE COURT: For the purpose of this hearing I will allow it. Overruled.

MR. PECK: It is intended solely for the issue of probable cause, your Honor.

THE COURT: All right. Are you aware what you were starting to say?

THE WITNESS: Yes.

A I was aware that the perpetrator had used his fists to beat the complainant and that the complainant's pocketbook was taken with personal property of hers in it in the amount of $45 in United States currency and various checks, credit cards in her name that the perpetrator dragged the victim, after taking her property, had dragged her into an alleyway and threatened to kill her and proceeded to beat the victim.

Q And, Detective, were you carrying this alleged event as a robbery on police records?

A Yes.

Q That is a felony, correct?

November 16th.

Q And would you tell the Court what Gomez told you?

A He told me he had on green patent leather shoes, the new mod type with the wedgie type heel, he was a medium skinned Negro of about six foot, well built, neat attire and he had on a leather jacket and a large collar shirt and that he was doing his laundry across the street in a laundromat from the Great Neck Plaza Railroad Station.

Q And did you know that location, Detective?

A Yes, I did.

Q Now, you mentioned the name of James Woods. At any time did you talk to James Woods in this time span of the 11 to 11:30 on the morning of November 16, 1972?

A Yes.

Q What was the extent of that conversation, Detective?

A I merely entered the room and asked him what the defendant was wearing, what he looked like and whether or not he knew him to be armed.

Q What did Woods tell you?

A Woods gave me the same description that Detective Gomez had told me and he told him he didn't know if he was armed but he wasn't going easy, he was tough.

Q And after this conversation with Gomez and Woods, what if anything did you do, Detective Sonesen?

A I was assigned by the lieutenant to go up into Great Neck and to pick up the suspect.

A I told him that I am very shook up right now and I was beaten up quite a bit.

Q Did you tell him where it happened?

A Yes, I showed him where it happened.

Q Where was it that you first saw the patrolman?

A In the alley, they came to get me.

Q Did you have any further conversation with this patrolman?

A I had very little because he took me to the North Shore Hospital, I was rather hysterical.

Q Please, Mrs. Abrams, did you have any other conversation with this patrolman?

A No.

Q And you do not recall whether you described your assailant to the patrolman?

A I described him as best - - I described - - I didn't describe him accurately, not accurately.

Q All right.

A I was a little incoherent at that particular time.

Q Did you go anyplace with the patrolman?

A Yes, they took me to the North Shore Hospital.

Q Did he take you in an automobile?

A In an ambulance.

Q Did the patrolman go in the ambulance with you?

A Yes.

Q Did you talk with him while you were in the ambulance?

A No.

Q About what time was it that you left the hospital?

A I would say a couple of hours because I waited.

Q About what time?

A About eight, nine o'clock.

THE COURT: That was in the evening?

THE WITNESS: Yes.

Q Did there come a time thereafter when you discussed the incident with a member of the Police Department?

A Yes, the next day.

Q And who was that?

A Detective Meinenger and Detective Gomez.

Q I'm sorry.

A Meinenger and Detective Gomez.

Q You know Meinenger's first name?

A No, I don't.

Q You know his shield number?

A No.

Q Do you know where he is from?

A The Sixth Precinct.

Q Do you know Detective Gomez's first name?

A No.

Q Do you know his shield number?

A No.

Q Do you know where he came from?

A The Sixth Precinct.

Q They both came to your apartment?

A Yes.

Q And did they ask you questions?

A Yes.

Q Did you tell them what happened?

A Yes.

Q Do you recall what you told them?

A Yes.

Q Would you please tell me what you told them?

A I went into detail with them. I was coming home from shopping, I delivered my daughter off at the apartment house and I parked my car at Hill Park Avenue in my garage. I was walking home to my apartment house when I heard footsteps and I turned around and the defendant started hitting me, punching me.

Q You didn't tell them the defendant started hitting you, did you?

A No, I didn't.

Q Please tell us what you told them.

A I said that a tall Negro man started to hit me with his fists on my head primarily and my shoulders and I said, "What do you want?" and he said, "I want everything," so I threw my bag at him and he proceeded to hit me and there was a period, a short period of time he stopped and said, "Now, get up," and when I got up I started to run and scream on the top of my lungs, I guess, and he pulled me by my hair and said, "Now, I have to kill you," and he dragged me into the alleyway and

he threw me down and started to hit me again and my neighbor looked out the window and she said, "What are you doing to her?" and he fled.

Q Is that what you told the detectives?

A That is what I told the detectives.

Q Did you tell them anything else at that time?

A They asked me what I had in my possession?

Q Did you tell them?

A I told them that he had - -

Q What did you tell him?

A That I had a fairly worn luggage colored bag with everything I had in it. I had my charge accounts and my checks and my wallet and I had makeup and, you know, I carried a paper bag with a shirt and a belt in it.

Q Is that what you told the detectives?

A Yes.

Q Did you tell them anything else?

A They asked me to describe him.

Q Did you?

A I desribed him.

Q You told me just a moment ago that it was a tall Negro man?

A Yes, and they asked me, "Can you describe him more?"

Q And did you?

A Yes, I did.

Q What did you tell them?

A I told them he was a large man and he was clean shaven, except I remember he had very long sideburns. He had a short close haircut, his hair was short, and I guess that is what I told them.

Q Nothing further, no other details?

A They asked me what he was wearing. I remember him wearing a three quarter coat. I couldn't go into detail exactly. I really noticed his face and fist more than his attire.

Q I'm sorry.

A They asked me what he was wearing and I remembered him wearing a three quarter jacket but I really couldn't - -

Q Did they ask you what he weighed?

A Yes, I guess so. He was big to me. I don't remember, about two hundred pounds. I don't know if they asked me, I don't think they asked me.

Q Did they ask you how tall he was?

A Yes.

Q What did you tell them?

A To me he looked like six-two but I am tiny.

Q Did they ask you what time it happened?

A Yes, approximately 6:00.

Q You told them 6:00?

A Approximately.

Q Did you say approximately or did you say exactly?

A I said approximately.

Q Well, how did you know what the time was?

Q Please tell - -

A - - approximate height.

Q Tell us specifically what he told you?

A He said that James Woods had told him that the defendant, John McLean, had perpetrated the crime. That he had just left him that morning and that he was doing his laundry in a laundromat in the Great Neck area. He gave me a physical description of him, about six foot, 200 pounds, well built, not too thick here, clean shaven, thick sideburns, well dressed, leather jacket, wide collar on his shirt, green patent leather shoes.

Q That is a pretty complete description, wasn't it?

A Yes.

Q Did he say anything else?

A Yes.

Q What else did he tell you?

A Who are we referring to, counselor?

Q Detective Gomez.

A No, I don't believe so.

Q Now, Detective Steinmann was not assigned to the case, was he, on November 16, 1972?

A Yes.

Q So that you were assigned, Detective Meinenger and Detective Steinmann?

A Detective Meinenger is the investigating detective throughout this whole case.

Q You made that clear and you are his assisting investigating

hour. I stood out on the curb and Mr. Woods had given us a description of a male Negro, approximately six foot, wearing a black leather three-quarter length jacket, green patent leather shoes. About one o'clock a male Negro wearing these clothes came down. He was eastbound on Welwyn Road in Great Neck Plaza.

MR. PRANDT: What road?

Q What road?

A Welwyn.

Q Yes.

A I motioned to Detective Sonesen this was possibly the suspect that we were looking for, we had been waiting for. We approached the subject as he was walking into the laundromat. Detective Sonesen and myself, we took out our shields, we called to the suspect, "John McLean."

Q Where was Burton?

A I was with Detective Sonesen, I don't recall his exact location.

Q Proceed, you called out, "John McLean."

A We called out, "John McLean." The defendant sitting at counsel table turned around and we identified ourselves with the Sixth Squad.

Q Do you recognize for the record, do you recognize the person whom you saw at the laundromat in the Court today?

A Yes.

Q Would you be more precise, Detective?

Gomoz before you left?

A No, sir.

Q Please tell me as best you recall what Detective Sonesen said with respect to Woods' statement?

A Well, - -

MR. PECK: Objection.

THE COURT: Overruled. That is before they left the precinct, Mr. Brandt?

MR. BRANDT: Yes.

THE COURT: All right, what if anything did Detective Sonesen say to you before you left the precinct with regard to Woods' so called statement?

THE WITNESS: Well, that a robbery, Detective Meinenger had a robbery of a female white that had occurred on Schenck Avenue and some checks had been taken from her in this robbery.

Q I'm sorry to interrupt. I asked you specifically, we will get to the other things, specifically what he said about Woods' statement?

MR. PECK: Objection, he is answering the question.

THE COURT: Is that part of your answer?

THE WITNESS: Yes.

THE COURT: What if anything did Detective Sonesen say to you about Woods' statement? Are you leading up to that?

THE WITNESS: Just that it was a male Negro, six foot, he had a black leather jacket and green, as I recall, green

patent leather shoes and it was a light skinned Negro and this is the man we were going to go to pick up.

Q That is what Detective Sonesen told you was the description?

A Correct.

Q What did Woods say in his - - What did Sonesen say that Woods had indicated in his statement?

A Well, the man we were going to pick up had given this - - This defendant had given Woods the checks and there was possibly a suspect wanted in this robbery.

Q Was it a written statement or oral statement?

A What, that Woods had given? As far as I know it was still an oral statement.

Q How did you know that?

A I don't know it for certain, I understand at that time it was an oral statement.

Q When did you find out that a written statement had been given?

A Well, I first saw the statement last Monday, that they had a written statement, a written statement had been given to the Detective Gomez.

Q You did not know prior to that time that Woods had given a written statement?

A No, I do not know that.

Q You did not discuss your testimony of this case with any other officer?

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McLean was not there at that time. We went outside and Detective Sonesen and myself stood in front of either an Associated or an A & P food store on Welwyn Road and Detective Steinmann walked down the sidewalk towards the laundromat and we thought we would wait there and see if John McLean came back to the laundromat.

Q Did you wait there?

A Yes, we did wait.

Q How long did you wait?

A Perhaps half an hour.

Q What happened if anything at that time?

A John McLean, as I know him now was walking from Middle Neck Road toward the laundromat. He had a black leather three quarter length jacket on, a shiny type, and some green shoes. He was carrying a brown paper bag in his hand.

Q What brought McLean to your attention, if anything, Detective?

A His basic physical description and the green shoes and black leather three quarter length jacket was described to me by Lieutenant Brendell prior, that this was what he was wearing.

Q And did you see him or did someone point him out to you?

A Either Detective Steinmann, I believe it was Detective Steinmann that pointed to him and we all approached him from where we were. We stopped him in front of the laundromat.

Q What happened at that time?

A Detective Sonesen asked him, "Are you John McLean?" and

THE COURT: My ruling, he said the notes that he believes he made, correct me if I am in error, Mr. Witness, have nothing whatsoever to do with any conversation you had with Mrs. Abrams, is that right?

THE WITNESS: No, it couldn't be that because she gave me a description, a tentative description.

THE COURT: Let me see his notes, Mr. Peck.

MR. PECK: I don't know which they are.

THE COURT: Pick them out of the jacket, Mr. Witness.

MR. WITNESS: If you can read them, your Honor.

THE COURT: I will hand it back to you, Mr. Peck, and ask you if you have any objection to the witness producing it. Take a moment and read it.

MR. PECK: I'm sorry, I didn't hear your question.

THE COURT: Read it and tell me if you have any objection to the witness being required to produce it by the Court.

MR. PECK: Yes, sir.

THE COURT: On what ground?

MR. PECK: On the grounds that a question has not been asked of this witness with regard to what is in the piece of paper.

THE COURT: The question was asked did he make any notes. I think that was the question, was that not it, Mr. Brandt?

MR. BRANDT: Yes, it was.

to every objection?

THE COURT: Of course.

Q Did the complaining witness tell you when you first saw her that the perpetrator was a black male, six feet two inches tall?

MR. PECK: Objection.

THE COURT: I will permit the answer to that. Overruled. If you recall did she tell you that?

THE WITNESS: I don't recall.

THE COURT: Take a look at Defendant's H for identification and see if that refreshes your recollection with regard to the last question.

THE WITNESS: Yes, that is what I have here.

Q Detective Meinenger, did you say you have no knowledge that the complaining witness was present viewing photographs for the purpose of identifying the perpetrator of the crime?

MR. PECK: Objection.

THE COURT: Did you say that was the question?

THE WITNESS: I don't think so, no.

THE COURT: Next question.

Q Do you know that the complaining witness was shown photographs for the purpose of indentifying the perpetrator of the crime?

A Yes, sir.

A He told me.

Q Did you make any notes with respect to your interview with Mrs. Abrams?

A No, I did not.

Q Have you made any notes with respect to your investigation of this case at all?

A No, sir, I did not.

Q No memorandum whatsoever?

A None whatsoever.

Q So all of your testimony today is based on your recollection?

A That would be correct, sir.

Q When was the next time you saw Mrs. Abrams?

A I never saw Mrs. Abrams again after the initial night,

Q Were you present when Mrs. Abrams attempted to identify the perpetrator of the crime through viewing photographs?

A I never saw Mrs. Abrams after the first night of the investigation, counselor.

Q Did you have any conversation with Mrs. Abrams over the telephone after the first time you saw her?

A I may have but I don't recall.

Q Detective Gomez, as a matter of practice, when you make a court appearance do you make a record of that court appearance?

that you spoke to her?

THE WITNESS: Yes, sir.

THE COURT: Now, put a question, Mr. Brandt.

Q Were you assigned to the patrol car she was in?

A No, sir.

Q Were there other officers in the patrol car?

A Yes.

Q Who were they?

A Patrolman Conversano.

Q Was he out of the Sixth Precinct?

A Yes, sir.

Q And would relate the conversation you had with Mrs. Abrams at that time?

MR. PECK: Objection.

THE COURT: Overruled.

A She stated that she was parking her car on Hill Park Avenue and she was walking north on Gilcrest Avenue and a man jumped out, knocked her down and took her purse.

Q Did she tell you anything else?

A That he was a male Negro and that he ran east across Gilcrest Road. She gave me a description of him. We went over the notification.

Q What was that description?

THE WITNESS: Your Honor, I have to look through this.

THE COURT: She gave you a description which you made a notation of?

THE WITNESS: I made a notation and also we went over the air on it.

THE COURT: Do you need that memorandum pad that you just showed me in order to refresh your recollection of that description?

THE WITNESS: Yes.

THE COURT: You may look at the memorandum pad and then wait for your next question.

Q What description did she give you?

A It was a male black, approximately six foot, six one, six two, short cropped hair, clean shaven, light complexion.

Q I'm sorry, clean shaven, light complexion?

A Clean shaven, light complexion.

Q Did she tell you anything else?

A Not at that time, no.

Q What happened after she gave you this description?

A We went over the police radio with the notification.

Q After that what happened?

A We requested an ambulance and Mrs. Abrams was taken to North Shore Hospital and treated.

Q Did you go with her to the hospital?

A One of the other officers went with her but I went to

the Sheriff's Department.

THE COURT: You advise the Court, Mr. Brandt, this photograph that has just been handed to me with the words on the back, "Height, five foot eight inches, weight 172 pounds," and at the bottom the words, "1949, male Negro," these words were on the back of this photograph which you received in response to the subpoena duces tecum which the Court signed on March 20, 1973?

MR. BRANDT: Yes, your Honor.

THE COURT: And are you offering this in evidence?

MR. BRANDT: Yes, your Honor.

THE COURT: I see. Based upon your advice to the Court that your received this photograph in response to the subpoena you say from Captain Clark - -

MR. BRANDT: Our investigator received it from Captain Clark.

THE COURT: When he served the subpoena?

MR. BRANDT: Yes, your Honor.

THE COURT: And you are offerring this in evidence?

MR. BRANDT: Yes, your Honor.

THE COURT: Well, stipulation or no stipulation, based upon what you just told me I will mark it in evidence as a Defendant's exhibit.

MR. BRANDT: Thank you, your Honor.

THE COURT: All right, wait just a moment, Mr. Peck, I will be right with you. I have another matter waiting for my attention. I am trying to collate our time clock with respect to lunch, the other matter awaiting my attention and then we are going to reconvene this afternoon. Bear with me for just a moment while I check these few things out.

(Whereupon there was an off the record discussion, not within the hearing of the court reporter.)

THE COURT: All right, we may go on. Mr. Peck, you may put your next question.

Q Detective, referring you to Defendant's Exhibit F entitled "Remarks."

MR. PECK: If I may, Judge, May I read this part to the jury?

THE COURT: You may, it is in evidence.

MR. PECK: Yes.

THE COURT: The entire document is in evidence, except for a portion that is redacted.

MR. BRANDT: Except for the portion redacted?

THE COURT: Yes, of course.

MR. PECK: "Remarks: Prior record, outside Nassau County, character, reputation, associates, special knowledge regarding this case. Prior arrest admitted by Def. for robbery and assault, 1968, spent four years in Green Haven, Stormville,

New York."

THE COURT: Now, Mr. Foreman and Madam of the jury. As you have just heard from the District Attorney this Defendant's Exhibit F in evidence refers to a prior arrest of the defendant. I charge you that a prior arrest is no proof - - I should say I instruct you rather than charge you, I instruct you that a prior arrest is no proof that the defendant is guilty of the crime for which he is being tried. Is that clear to everyone? Next question.

MR. PECK: May I see the exhibit.

Q Now, Detective, if you were instructed or ordered to work on a non-scheduled tour is it not a fact that - -

MR. BRANDT: Objection, your Honor.

THE COURT: As to the form of the question, sustained.

Q At any time does a policeman or a detective get overtime?

A Yes.

Q Now, what is that overtime based on, time and a half, double time, whatever it may be?

MR. BRANDT: Objection, I think it might be irrelevant.

THE COURT: Sustained.

Q When does a detective get overtime?

MR. BRANDT: Objection, your Honor.

THE COURT: Sustained.

Q Meinenger was not working the tour of duty that you were

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 11, 1974.

[redacted]
[redacted]
[redacted]
HON. HENRY J. LATHAM, Acting Presiding Justice,
HON. J. IRWIN SHAPIRO
HON. JOHN P. COHALAN, JR. *Associate Justices*
HON. MARCUS G. CHRIST
[redacted]
[redacted]
HON. FRED J. MUNDER

The People of the State of New York,

Respondent,

v.

John McLean,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named John McLean, defendant in this action, having appealed to this court from a judgment of the County Court, Nassau County, rendered May 11, 1973, convicting him of robbery in the second degree, upon a jury verdict, and imposing sentence;

and the said appeal having been argued by Eugene Murphy Esq., of counsel for the appellant, and argued by Jules E. Orenstein, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

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A D 2d

A - January 17, 1974.

214 E

The People, etc., respondent,
v. John McLean, appellant.

Appeal by defendant from a judgment of the County Court, Nassau County, rendered May 11, 1973, convicting him of robbery in the second degree, upon a jury verdict, and imposing sentence.

Judgment affirmed.

During the trial, the District Attorney was allowed to read to the jury from a police form concerning defendant's past criminal record. This constituted error, even though defense counsel had introduced the form into evidence earlier in the trial and had read to the jury from another part thereof (People v. Condon, 26 N Y 2d 139). However, the Trial Judge later clearly charged the jury to disregard the form and its contents. Moreover, the proof of defendant's guilt was so overwhelming that there was no reasonable possibility of a verdict other than the one rendered. Under these circumstances, we deem the error harmless (CPL 470.05, subd. 1).

State of New York
Court of Appeals

D

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JOHN McLEAN,

Defendant-Appellant.

CERTIFICATE DENYING LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
April 19, 1974

Charles D. Breitel
Chief Judge

James J. McDonough, Esq.
Legal Aid Society of Nassau County
400 County Seat Drive
Mineola, New York

74C 1018 U.S.A. ex rel McLEAN - vs. - PATTERSON etc.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
7-12-74	By PLATT, J. - Order dtd. 7-12-74 allowing petitioner to proceed in forma pauperis filed.	1	
7-12-74	Petition for writ of habeas corpus filed.	2	JS5
7-15-74	By COSTANTINO, J. - Order to show cause why a writ of habeas corpus should not be issued etc. ret. 7-16-74 @ 10 A.M. without proof of service filed.	3	
7-15-74	Relator's memorandum of law filed	4	
7-16-74	Affidavit of personal service of order to show cause filed	5	
8/6/74	Affidavit in opposition of Margery Evans Reifler & memo of law filed	6/7	
9-12-74	Before COSTANTINO, J. Hearing on order to show cause, etc. ARGUED. DECISION RESERVED.		
10-25-74	BY COSTANTINO, J. MEMORANDUM and ORDER FILED. Ordered that the parties appear before this court on the 20th day of November, 1974 at 10:00 A.M. in order that a hearing may be held to amplify the record of the trial court with regard to facts, etc. SO ORDERED. (See Memo.,etc.)	8	
12-19-74	Affidavit of EUGENE MURPHY filed. Letter of Eugene Murphy, filed and attached thereto.	9 & 10	
12-20-74	BY COSTANTINO, J. MEMORANDUM and ORDER FILED. Since relator has not established that he has been deprived of a constitutionally protected right, his petition must be DEINED. (See Memo.,eec.)	11	
1-10-75	Application of Eugene Murphy, A ppeals Bureau, (Legal Aid) filed for a certification of probable cause, together with a CERTIFICATE OF PROBABLE CAUSE (Signed by COSTANTINO, J.) filed and attached.	12 & 13	
1-10-75	NOTICE OF APPEAL FILED. (With Proof of Service thereon)	14	
1-14-75	Copy of Notice of Appeal was on this day mailed to Clerk,U.S.C.A.		
1-14-75	Notice re preparation of Record on Appeal, together with Forms C and D were on this day mailed to James J.McDonough, Esq., (Legal Aid, etc., 400 County Seat Drive, Mineola, N.Y.)		
1/16/75	Relator's reply memorandum of law filed	15	